

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

76-6158

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM DAVIS MARTIN,

Plaintiff-Appellant,

-against-

JOHN W. WARNER, Secretary of the Navy and
ADMIRAL D.W. COOPER, Chief of Naval Reserves,
Department of the Navy,

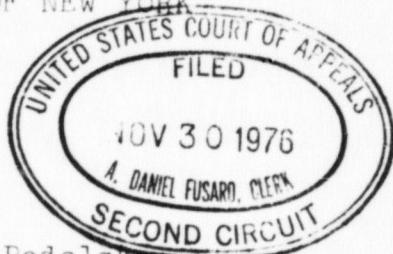
Defendant-Appellees.

B

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

JOINT APPENDIX



Ronald Podolsky
Attorney for Plaintiff-
Appellant
15 Park Row,
New York, N.Y. 10038
212 962 3351

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Appellees
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Brooklyn, N.Y. 11201
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PAGINATION AS IN ORIGINAL COPY

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*No answer was served. A cross notice of motion for summary judgment with statement Pursuant to Local Rule 9 at 34 was served in response to the amended complaint and motion for summary judgment.

RELEVANT DOCKET ENTRIES

3-15-76: By PLATT, J. -Stip. dtd 3-11-76 permitting pltff to serve and file an amended complaint; that the motion for summary judgment is re-noticed for 5-14-76 filed. 19.

3-15-76: Amended complaint filed. See document #19.

5-7-76: Notice of motion ret 5-14-76 with memo of law filed. 20/21.

5-12-76: Pltff's reply memo filed. 22.

9-22-76: By PLATT, J. -Memo & Order dtd 9-21-76 granting deft's cross motion for summary judgment filed. copies mailed. 23.

9-22-76: Judgment that pltff take nothing of the defts and that pltff's motion for summary judgment is denied and deft's cross-motion for summary judgment is granted filed. 24.

10-1-76: Notice of appeal filed. Copy to C of A. 25.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILE NUMBER 74C814

WILLIAM DAVIS MARTIN,

NOTICE OF APPEAL

Plaintiff

-against-

JOHN W. WARNER, Secretary of the
Navy and ADMIRAL D.W.COOPER,
CHIEF of Naval Reserves, Department
of the Navy,

Defendants.

: Notice is hereby given that WILLIAM DAVIS MARTIN, Plaintiff
above-named hereby appeals to the United States Court of
Appeals for the Second Circuit from the final judgment entered
in this action of the 22d day of September, 1976 and from
the order upon which said judgment was based dated September
21, 1976 which Order by HON. THOMAS J. PLATT, USDJ, did deny
plaintiff's motion for summary judgment and did grant the
motion of the defendant for summary judgment dismissing
the amended complaint herein, and from each and every part of
said judgment, order and memorandum.

Yours, &c.,
Ronald Podolsky
RONALD PODOLSKY
Attorney for Plaintiff
15 Park Row, New York, N.Y.
10038 212 962 3351

TO:
DAVID T. TRAGER, ESQ.
Attorney for Defendants
U.S. Courthouse
225 Cadman Plaza
Brooklyn, N.Y.

Clerk of the Court
225 Cadman Plaza
Brooklyn, N.Y.

JUDGMENT APPEALED FROM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM DAVID MARTIN,

Plaintiff,

- against -

JUDGMENT

JOHN W. WARNER, Secretary of the Navy and Admiral D.W. Cooper, Chief of the Naval Reserves, Department of Navy,

SEP 22 1976

Defendants.

TIME AM
TIME PM

A memorandum and order of Honorable Thomas C. Platt, United States District Judge, having been filed on September 22, 1976, denying plaintiff's motion for summary judgment and granting defendants' cross-motion for summary judgment, it is

ORDERED and ADJUDGED that plaintiff take nothing of the defendants and that plaintiff's motion for summary judgment is denied and defendants' cross-motion for summary judgment is granted.

Dated: Brooklyn, New York
September 22, 1976

Lewis Orgel
Clerk

JUDGMENT APPEALED FROM

ORDER OF PLATT, J.

RECORDED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM DAVIS MARTIN,

Plaintiff,

-against-

JOHN W. MARSH, Secretary of the
Navy and Admiral D. W. Cooper,
Chief of the Naval Reserves,
Department of the Navy,

Defendants. *

PLATT, D.J.

74 C 814

MEMORANDUM AND
ORDER

September 21, 1976

FILED

IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

SEP 22 1976

TIME AM
PM

To put it mildly, this is somewhat of a unique case which is now before this Court for the second time. The Court's first opinion is reported at 377 F.Supp. 1039 (E.D.N.Y. June 18, 1974).

At this juncture, plaintiff moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment on his amended complaint which seeks a judgment directing that he be promoted to the rank of Captain, USNR, retroactively to July 1, 1974, including incidental benefits such as loss of pay and pension differential between the ranks of Commander and Captain, etc. Defendants, under the same Rule, cross move also for summary judgment. The facts are not really in dispute. They are as follows:

On February 12, 1974, defendant Warner, pursuant to 10 U.S.C. § 5895, furnished to a Selection Board convened under 10 U.S.C. § 5893 the name and record of the plaintiff as one who was eligible for consideration for promotion by the Board to the rank of Captain in the United States Naval Reserve.

Pursuant to § 5897 of Title 10 of the United States Code the Selection Board apparently recommended the plaintiff for promotion and pursuant to § 5898 of such Title, the report of such Board then should "be submitted to the President for his approval or disapproval."

The government concedes that plaintiff's promotion was approved, and pursuant to § 5912 of such Title and § 2 of Article II of the United States Constitution plaintiff's appointment was submitted to the United States Senate to comply with the requirement that appointments in grades above Captain in the Naval Reserve "shall be made by the President, by and with the advice and consent of the Senate". On April 24, 1974 the United States Senate confirmed a temporary appointment to the rank of Captain for the plaintiff.

On May 3, 1974, plaintiff is alleged to have "streaked" through the Belmont Hotel ballroom in New York City in the presence of a group of fellow Naval Reservists and their ladies, all of whom were in civilian clothes at a U.S. Naval Reserve dance at that hotel.

ORDER APPEALED FROM, PLATT, J.

The Chief of Naval Reserves ordered an investigation of the incident. Plaintiff unsuccessfully sought to restrain this investigation in this Court (377 F.Supp. 1039) and in the Court of Appeals (aff'd without opinion).

By memorandum dated June 28, 1974 the Secretary of the Navy "approved" a request of Bureau of Personnel "that the Chief of Naval Personnel be authorized to take no action with regard to temporary promotion of the plaintiff to Captain pending resolution of his alleged misconduct" as authorized by 10 U.S.C. § 5902(d), as amended.

On July 1, 1974, plaintiff's "running mates" on the Captains' list assumed the rank of Captain, United States Naval Reserve, but defendants claim plaintiff did not.

Following the investigation the Chief of Naval Reserve found "that this matter cannot be resolved satisfactorily by court martial" and said that he "considers that subject officer by his conduct is no longer qualified to remain on active duty * * *. It is therefore recommended that this matter be brought to the attention of the Secretary of the Navy requesting that he be released from active duty and if eligible be given the opportunity to retire but that retirement be in the grade of Commander". (Memorandum from Chief of Naval Reserve to Judge Advocate General, July 15, 1974.)

On November 12, 1974, the Secretary of the Navy "approved" a memorandum for him from the Bureau of Naval Personnel recommending that he "acting for the President," remove Commander Martin's name from the promotion list.

By the Secretary's "approval" of such memorandum defendants maintain that the President removed plaintiff's name from the promotion list in accordance with Title 10 United States Code § 5905(a).

The Secretary, however, seems to have no such power under 10 U.S.C. § 5905(a). He only appears to have the power under 10 U.S.C. § 5092(d), as amended, to delay the promotion of an officer who was under an investigation, etc.

The defendant argues that such power may be presumed to have been delegated to the Secretary. 3 U.S.C. § 302. However, under 3 U.S.C. § 301, by Executive Orders Nos. 10621, 10661 and 11390 the President has expressly delegated certain of his prescribed authority under Title 10 of the United States Code (see e.g., Title 10 U.S.C. §§ 7291, 5083, 5133, etc., and West's Supplementary Pamphlet 1927-1975 for 3 U.S.C.A. at 394, 397, 398, 402) but has not so delegated his authority under Section 5905(a) of such Title. This would clearly seem to indicate that the Secretary had no such "implied delegated authority" and that neither Congress nor the President had made any such delegation expressly or by implication.

This does not, however, defeat the defendants' case because in the last analysis plaintiff's position really is that following the completion of the investigation by the Secretary, the President has failed to complete his appointment (after Senate confirmation) "by failing to prepare or sign the commission". D'Arco v. United States, 194 Ct. Cl. 811, 816 (1971; Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803).

ORDER APPEALED FROM, PLATT, J.

It is indisputable that the plaintiff was selected for promotion to the "temporary" rank of Captain. Such a promotion is terminable at any time (see 10 U.S.C. § 5596(h), 5779) or revocable at will by the President.

Thus there is not even a possible argument that the President had any obligation to complete the plaintiff's appointment by preparing and signing his commission (cf: Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803)), and his failure to do so in this instance may be said to be the equivalent of, or tantamount to, an affirmative removal by him of plaintiff's name from the promotion list under 10 U.S.C. 5905(a).

Viewed in this light, and for such reasons, plaintiff's motion for summary judgment must be denied and defendants cross-motion therefor must be granted.

SO ORDERED.

Thomas C. Clark
U.S.D.J.

AMENDED COMPLAINT

JUDGE PIATT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM DAVIS MARTIN,

Plaintiff,

-against-

Index 740814

JOHN W. WARNER, SECRETARY OF THE NAVY and
ADMIRAL D.W. COOPER, CHIEF OF NAVAL RESERVES,
DEPARTMENT OF THE NAVY,

AMENDED COMPLAINT

Defendants.

Plaintiff through his attorney, RONALD FODOLSKY, ESQ., complaining
of the defendants herein respectfully show this Court and allege:

1. Jurisdiction is conferred upon the District Court by virtue of 28, USC §1331(a), 1361 and 2201 in that mandamus and related relief against officers of the United States who are alleged to be not performing duties owed to the plaintiff is being sought with a prayer for declaratory judgment, mandamus and possible back pay.
2. That at all times hereinafter mentioned the Secretary of the Navy and the Chief of Naval Reserves or their successors were and still are charged with administering pursuant to lawful mandate the affairs of the United States Naval Reserve.
3. That at all times hereinafter mentioned the Plaintiff was an officer in the Naval Reserves on active duty, service over 22 years.
4. That heretofore on or about April 24, 1974, plaintiff and other officers were selected for temporary appointment to captain in the Naval Reserve by the President of the United States with the Advice and Consent of the United States Senate.
5. That plaintiff was thereupon placed upon a list of selectees

AMENDED COMPLAINT

thus approved, and awaited the opening of a billet of Captain to fill. Plaintiff is a combat pilot veteran with extensive decorations.

6. That on July 1, 1974 the selectees next senior and next junior to plaintiff on the list assumed the rank of Captain, United States Naval Reserve, but plaintiff was not included in the assumption of said Rank, although he was to be promoted that date absent impediment.

7. That upon information and belief there had theretofore not been any order of the Secretary of the Navy delaying plaintiff's promotion, and no such order was ever delivered to plaintiff.

8. That upon information and belief on November 12, 1974 the defendant Secretary of the Navy signed a document purporting to remove plaintiff from the list of selectees.

9. That the action of the Secretary of the Navy in purporting to remove the plaintiff from the list of selectees for promotion to Captain was without lawful authority.

10. That the plaintiff was not removed from the said list by the President of the United States.

11. That the President of the United States was not informed prior to the alleged removal of any cause for which plaintiff should be so removed.

12. That the President of the United States provided no imput whatsoever in the determination to remove plaintiff from said list.

13. That lawful authority to remove plaintiff from the list rests in the sole discretion of the President of the United States who did not exercise said discretion against plaintiff herein.

14. That upon information and belief the defendants had been informed about an incident which is alleged to have taken place on May 3, 1974 wherein it was alleged that plaintiff, while at a civilian

AMENDED COMPLAINT

party sponsored by the Reserve Officers Association at the Belmont Hotel in New York City did engage in an act of "streaking", to wit, running incognito in phantomlike fashion nude for the purpose of providing levity to the proceedings whereat a crowd is gathered.

15. That thereafter the defendants or their successors did cause an informal investigation to be conducted..

16. That on January 24, 1975, and after the plaintiff had been allegedly removed from the list, plaintiff was informed that the results of the investigation were complete and it was concluded therein that the subject investigation contains "matter of interest to your record. 2. No inference should be drawn from the above action that an adverse determination by the Chief of "Eval Personnel was reached in your case. A matter of interest holding does not constitute punitive action to a recipient, either inherently or by implication..."

18. That plaintiff has unlawfully been deprived of his rightful promotion and the attendant benefits and salary thereto by the defendants.

19. That plaintiff was compelled to retire in the rank of Commander whereas his true rank is Captain, and he is being deprived of attendant pension and other benefits of said rank, retirement date, June 30, 1975.

20. That plaintiff is being carried on the roster of retired officers as Commander rather than as Captain, his true rank.

22. That plaintiff has not adequate remedy at law.

WHEREFORE Plaintiff requests most respectfully a judgment directing that he be promoted to the rank of captain, USNR retroactively to July 1, 1974, together with such other relief as to the Court may seem just and proper including judgment for loss of pay and pension differential between the Rank of Commander and Captain, and attendant duties and benefits.

AFFIDAVIT IN SUPPORT OF MOTION

JUDGE PIATT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM DAVIS MARTIN.

Plaintiff,

-against-

74 C 814

JOHN W. WARNER, SECRETARY OF THE NAVY,
and ADMIRAL D.W. COOPER, CHIEF OF NAVAL
RESERVES, DEPT OF THE NAVY,

AFFIDAVIT

Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK: ss

RONALD FODOLSKY, ESQ. being duly sworn deposes and
says, that he is the attorney for plaintiff herein and is
familiar with the averments herein.

That the source of his knowledge is the entire file
in his possession consisting of many documents delivered by
defendants either to plaintiff prior to deponent's retention
as counsel or directly to your deponent in response to certain
interrogatories propounded by him in the course of the litigation.

That annexed hereto are the following exhibits to
assist the Court and toward which reference will be made
herein:

- Ex. A. Chronology of events assembled by deponent.
- Ex. B. Copy of Amended Complaint.
- Ex. C. Copy of reply to interrogatories.
- Ex. D. Appendix 3 of reply to interrogatories.
- Ex. E. Appendix 4 of reply to interrogatories.
- Ex. F. Appendix 5 of reply to interrogatories.
- Ex. G. Miscellaneous documents referred to by date.

That Appendix 1&2 to interrogatories are omitted as

AFFIDAVIT IN SUPPORT OF MOTION

unnecessary for the purposes herein. The original of the interrogatories, answers thereto and all appendices thereto are onfile with the Court.

That Plaintiff was a Commander in the U.S. Navy Reserve, on active duty. Pursuant to statute, he was selected for promotion to the rank of Captain by being nominated by the President of the United States, with the advice and consent of the Senate. The Senate confirmed his temporary appointment to captain on April 24, 1974 and he and other selectees were placed on a list for the purposes of assuming said rank. Were it not for the events hereinafter related, he would have assumed said rank on July 1, 1974. Ex C, Q/A 11, 20.

That plaintiff was not permitted to assume the rank of Captain on July 1, 1974. On or about November 12, 1974, the plaintiff was ostensibly removed from the list by a document endorsed by the Secretary of the Navy. The said document is Ex. Ex. D hereto. See also Ex. C Q/A 10. The authority for removal of plaintiff from the list was set forth as 10 USC §5005 (Ex. C, Q/A 41.)

That Section 5005 USC Title 10 provides that the President of the United States may remove a candidate selectee from such a list. In answer to other interrogatories the following was adduced: That Plaintiff was removed from the list by the action of the Secretary of the Navy because of alleged misconduct of plaintiff (S/Ra3); that the President of the United States was not personally advised of the Secretary's action removing Plaintiff from the list (R/A 5); that the president was not notified of the

AFFIDAVIT IN SUPPORT OF MOTION

incident by the officials of the Department of the Navy (Ex.C Q/A 6; that the President of the United States did not provide any input whatsoever into the determination to remove the plaintiff from the list. Q/a 26.

That from the foregoing it would appear that the plaintiff was not removed from the list by the President of the United States who was totally unaware of either the fact of the incident or the alleged fact of removal. The statute authorizing the President to remove a candidate from the selection list is directed toward Presidential action and discretion in 10 USC 5905. It is the plaintiff's contention herein that he is in fact a Captain in the United States Navy Reserve in that he was never removed from the list in accordance with law; that he was in fact unlawfully removed from the list by the Secretary of the Navy whose authority in this respect is delimited by 10 USC 5902(d) to delay promotion only during the period in which an officer is under investigation, and even that delay is limited to one year from date of selection unless the Secretary determines that further delay is necessary in the public interest.

That plaintiff was selected for promotion April 24, 1974 (Ex.C q/a 2). Upon information and belief the investigation was completed sometime before November 12, 1974, the date the Secretary of the Navy ostensibly removed him from the list (Ex. D). The actual date of completion is somewhat confusing and is treated in a separate point in the memorandum of law annexed hereto. The defendants contend that the investigation was complete before the Secretary acted. Ex. C q/a 21. Plaintiff was

AFFIDAVIT IN SUPPORT OF MOTION

neither informed of his delay in promotion (Ex. G4 par.7) nor of the alleged removal by the Secretary of the Navy of Nov. 12, 1974 until inquiry was made by plaintiff former attorney by letter dated Dec. 26, 1974.^{1/G-3} The first notice that he was allegedly removed from the list was by letter dated January 9, 1975 (Ex. D2). The only notification he received concerning the results of the investigation was by Ex. F dated January 24, 1975 wherein it was stated that the subject investigation "contains matter of interest to your record. 2. No inference should be drawn from the above action that an adverse determination by the Chief of Naval Personnel was reached in your case. A matter of interest holding does not constitute punitive action to a recipient, either inherently or by implication..."

That plaintiff was never even notified of any delay imposed by the Secretary of the Navy regarding the investigation. Exhibit D which is allegedly the removal document contains some vague reference to an enclosure 1, which enclosure was not provided by defendants herein to plaintiff, which enclosure 1 indicates that the Secretary had instructed the Chief of Naval Personnel to delay promotion (par. 1), however this appears to be in error because on at least two occasions letters were sent to plaintiff addressing him as Captain after his date of rank of July 1, 1974, one of which was from the said Chief of Naval Personnel (Ex. G2), which letter advised plaintiff of his retirement options.

From the foregoing it would appear that plaintiff certainly was not validly removed from the list by action of the President of the United States, and moreover it is doubtful if

AFFIDAVIT IN SUPPORT OF MOTION

he was validly delayed. A separate point discussing date of rank is contained in the memorandum of law.

That the alleged act of misconduct was an allegation from an unknown source (Ex.C q/a 17) that plaintiff, while at a civilian party sponsored by the Reserve Officers Assn. of which he was a dues paying member in good standing, engaged in an act of "streaking" i.e. running in phantomlike fashion nude before onlookers to provide levity to a proceeding. It is contended that he was not on duty at the time although the defendants contend that he could have been considered in some duty related capacity (Ex. E p.8). Whether or not either party is correct, the final determination concluded that he was, but that the matter was "of interest" only fr the file and did not constitute punitive action either inherently or by implication. (Ex F.)

That it is plaintiff's contention that he is a captain in the Navy with date of rank July 1, 1974 and that he was not validly delayed by the Secretary of the Navy pursuant to any order under 10 USC 5902(d) in that he did not receive any document reflecting said delay; moreover he is a captain by virtue of the fact that he was not removed from the list by the President of the United States pursuant to 10 USC 5905(a). If in fact the plaintiff were delayed by the Secretary, such delay necessarily would abate with the determination of the investigation, the period of time within which such delay could take place. If there were no delay plaintiff date of rank would be July 1, 1974. The action of the Secretary in depriving plaintiff of the rank to which he is entitled is arbitrary, capricious and unreasonable and unlawful depriving him of benefits at least since April 2² 1974

AFFIDAVIT IN SUPPORT OF MOTION

which would be one year past his selection.

That because plaintiff was never removed from the list and because he is a captain an Order seems appropriate by way of judicial review of administrative determination directing the defendants to cause plaintiff's promotion to captain to be effected, nunc pro tunc with attendant duties, back benefits and related relief, with judgment for any financial loss incurred by virtue of the illegal action of defendants.

That there are no references related by defendant in its answers to interrogatories which spell out the authority of the Secretary of the Navy to act under 10 USC 5005(a) supplanting the discretionary power of the President to remove.

That the Secretary of the Navy is limited by clearly defined statute to delay only.

Wherefore plaintiff respectfully suggests that there is no defense in law to the allegations of the complaint as amended and that summary judgment should be granted thereon.

Ronald Podolsky
RONALD PODOLSKY



DEPARTMENT OF THE NAVY

BUREAU OF NAVAL PERSONNEL
WASHINGTON, D.C. 20370IN REPLY REFER TO
Pers-82
Ser 2434/822b
30 OCT 1974

MEMORANDUM FOR THE SECRETARY OF THE NAVY

Subj: Commander William Davis MARTIN, USNR, 473 28 2768/1317

Ref: (a) BUPERSNOTE 1401 of 11 March 1974
(b) 10 USC 5905

Encl: (1) CHINAVFERS memorandum Pers 02 Ser 1392/822b of 27 June 1974

1. Commander William D. Martin, USNR, has been selected for promotion to the temporary grade of Captain. This selection was promulgated by reference (a). Enclosure (1) authorized the Chief of Naval Personnel to take no action with regard to the temporary promotion pending resolution of his alleged misconduct. The informal JAG Manual investigation in the case of Commander Martin was completed on 10 July 1974. The investigating officer found that Commander Martin did, on 3 May 1974, in the Belmont Hotel in New York City, in the presence of members of the Reserve Officers Association and their ladies, run nude into and out of the ballroom. The investigating officer recommended referral to court-martial for a violation of Article 133, UCMJ, - conduct unbecoming an officer. The convening authority, Chief of Naval Reserve noting that the "matter can not be resolved satisfactorily by court-martial" recommended Commander Martin's release from active duty, or in the alternative, acceptance of his request for retirement, but in the grade of Commander.

2. The pertinent issue is whether Commander Martin should be promoted or should his name be removed from the promotion list. 10 USC 5905 provides the authority for the President to remove an officer's name from the promotion list; the Secretary of the Navy acts for the President in this regard.

3. In view of all of the particular circumstances of this case, including but not limited to the facts surrounding the incident, it is recommended that the Secretary, acting for the President, remove Commander Martin's name from the promotion list promulgated by reference (a). It is considered that sufficient cause exists in this case to fully warrant Secretarial action pursuant to reference (b).

FOR OFFICIAL USE ONLY

18 D Appendix 3



Ex. D. to Affidavit in Support.

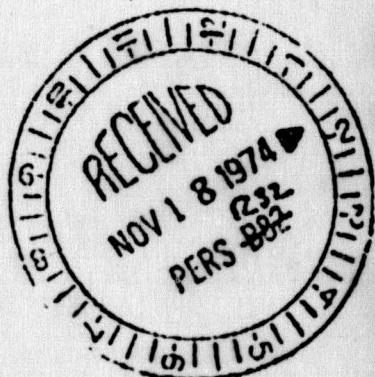
Pers-82
Ser 2434/8220

4. By separate administrative action and as a result of a TIA Continuation Board in April 1974, the Chief of Naval Personnel notified Commander Martin that he will be released from active duty no later than 30 June 1975 and that he may request retirement on or before 1 July 1975.

David H. Bacley
DAVID H. BACLEY

12 NOV 1974

APPROVED *J. William Middendorf II*
J. William Middendorf II
Secretary of the Navy



FOR OFFICIAL USE ONLY

2

Ex. D. To affidavit in Support.

POLAR-R322/GME-LP
473-28-2768/1317

8 JAN 1975

83

REGISTERED MAIL

From: Chief of Naval Personnel
To: Commander William Davis MARTIN, USNR

Subj: Promotion status in the United States Naval Reserve

Ref: (a) Title 10, United States Code, Section 5905

1. The Secretary of the Navy, acting for the President, removed your name from the promotion list on 12 November 1974 pursuant to provisions of reference (a).
 2. As a result of this action, you must again be recommended for promotion by another selection board before appointment to the next higher grade.

DAVID H. BAGLEY

20

REGISTERED MAIL _____
OFFICIAL CORRESPONDENCE FILE FOR
HARPER'S 521172 REV. 5-71

ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 2. Was plaintiff selected for inclusion on the promotion list for promotion to Captain by the President of the United States with the Advice and Consent of the Senate? If so, set forth a copy of the selection list whereon the plaintiff's name appears with the appropriate authentication signatures as appear on the original, the date of said list and whether said selection list was completed in accordance with appropriate regulations.

ANSWER. On February 15, 1974, the Acting Secretary of the Navy, J. William Middendorf, II, approved for the President of the United States the recommendation that plaintiff be promoted to captain. The Senate confirmed a temporary appointment to captain for plaintiff on April 24, 1974. The Chief of Naval Personnel (CNP) published a promotion list on March 11, 1974. The selection list approved by the Secretary of the Navy is attached as appendix 1. The CNP list is attached as appendix 2. The lists were completed in accordance with current regulations.

INTERROGATORY NO. 3. Was the plaintiff removed from said list? If so, set forth the reason for his removal.

ANSWER. Yes. Plaintiff was removed from the list by the action of the Secretary of the Navy subsequent to the finding of the informal JAG Manual investigation of plaintiff's conduct on May 3, 1975.

INTERROGATORY NO. 4. Was the plaintiff removed from said list by the President of the United States? If so set forth any written document signed by the President of the United States directing plaintiff's removal from the list.

ANSWERS TO INTERROGATORIES

ANSWER.

Yes See Appendix 3.

INTERROGATORY NO. 5. Was the plaintiff removed from the list for cause, which cause was made known to the President of the United States prior to plaintiff's removal from the list? If so, set forth all complete copies of any document which informed the President of the United States of any cause for which plaintiff's standing on the list should be considered for the purpose of Presidential action and include the date and full and complete copies of any acknowledgements of receipt by the President of the United States of said documents informing him of the incident of concern.

ANSWER. Yes, see answer to Interrogatory No. 3, supra.

Personally
The President of the United States was not/ advised of the Secretary's action prior to plaintiff's removal from the list.

INTERROGATORY NO. 6. Did the President of the United States have knowledge of the incident which formed the cause of removal of the plaintiff.

ANSWER. The President was not/ notified of this incident by officials in the Department of the Navy.

INTERROGATORY NO. 7. If so, was the information or knowledge of the incident imparted to the President through official channels? If so, set forth any document sent through official channels prior to plaintiff's removal from the list either to or from the President of the United States, including any direction or evidence of decision by the President of the United States to remove plaintiff from the list.

ANSWERS TO INTERROGATORIES

ANSWER. See answer to Interrogatory No. 6, supra.

INTERROGATORY NO. 8. Describe in detail how plaintiff was removed from the promotion list, including any actions by the President of the United States or any other public officer.

ANSWER. Plaintiff was removed from the promotion list by the Secretary of the Navy on November 12, 1974, subsequent to the finding of the informal JAG Manual investigation of the conduct of plaintiff on May 3, 1974, in the Belmont Hotel, New York, New York.

INTERROGATORY NO. 9. Set forth all documents reflecting the decision of the President of the United States to remove plaintiff from the promotion list.

ANSWER. The action of the Secretary of the Navy on November 12, 1974, is the document "reflecting" the decision of the President of the United States to remove plaintiff from the promotion list.

INTERROGATORY NO. 10. On what date was Plaintiff removed from the promotion list? Set forth all documents which effected the removal.

ANSWER. November 12, 1974. Document [Pers-82; Ser 2434/822b-30 Oct 1974], attached as appendix 3.

INTERROGATORY NO. 11. Had plaintiff not been removed from the selection list what would have been his date of actual promotion to the rank of Captain? How is this date determined? What would the salary differences be between the rank of captain then acquired and the salary which plaintiff was then being paid as Commander?

ANSWERS TO INTERROGATORIES

ANSWER. Plaintiff's temporary date of rank as captain United States Naval Reserve would have been July 1, 1974. The appointment would have been mailed to plaintiff on July 8, 1974. The date of rank of Reserve officers is determined by comparision with a Regular officer "running mate." See 10 U.S.C. § 5911. The difference in pay that plaintiff would have earned as a captain than what he earned as a commander is being computed and will be provided by a supplemental answer to this interrogatory.

INTERROGATORY NO. 12. When did the plaintiff leave active service with the Navy?

ANSWER. June 30, 1975.

INTERROGATORY NO. 13. Was plaintiff on active duty more than one year after he was placed on the selection list?

ANSWER. Yes.

INTERROGATORY NO. 14. Was plaintiff on active duty more than one year after the alleged incident forming the basis for removal?

ANSWER. Yes.

INTERROGATORY NO. 15. Was plaintiff on active duty more than one year after he would have been promoted had he not been removed from the list?

ANSWER. No.

INTERROGATORY NO. 16. Set forth a short recitation of the alleged incident which formed the basis of the complaint leading to the removal of plaintiff from the list.

ANSWER. See paragraph 1 of appendix 3.

INTERROGATORY NO. 17. How was the incident reported to the Navy? Set forth all documents received by the Navy reporting the incident.

ANSWERS TO INTERROGATORIES

ANSWER. The exact manner how the incident was reported to the Navy has not been determined. A diligent search for this information is continuing, however, and should the information be discovered it will be provided by a supplemental answer to this interrogatory.

INTERROGATORY NO. 18. Were the reports in the nature of a complaint or mere report? Did any of the reports praise the subject of the report both as to past good standing and praise for leadership in providing levity to the proceedings? Were any reports in the nature of a complaint?

ANSWERS TO INTERROGATORIES.

Were any reports of the incident in the nature of a complaint received from any sources at all? If so set forth a copy thereof.

ANSWER. See answer to Interrogatory No. 17, supra.

INTERROGATORY NO. 19. What action was taken by the Navy in the investigation of the reports of the incident?

ANSWER. The Chief of Naval Operations (CNO) requested that the Chief of Naval Reserve (CNR) inquire into the incident. The CNR ordered a formal investigation into the incident pursuant to regulations contained in the Manual of the Judge Advocate General of the Navy (JAGMAN). Subsequently, CNR rescinded the requirement for a formal investigation and ordered, instead, an informal investigation pursuant to the aforementioned JAGMAN.

INTERROGATORY NO. 20. Was the conclusion of the Investigating Officer and the final determination of the Navy that no disciplinary action was needed against plaintiff and that the report was merely a matter of interest for the file? If so set forth the copy of the final determination.

ANSWER. The investigating officer recommended a trial by court-martial. The final determination was against court-martial. A complete copy of the JAG Manual investigation with all endorsements is attached as appendix 4.

INTERROGATORY NO. 21. Was Plaintiff's removal from the promotion list prior to the date of the determination of the Investigating officer?

ANSWER. No.

ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 22. What was the reason for the Plaintiff's removal from the list? Who removed plaintiff from the list and what documents support said removal. Set forth a copy of the documents indicating who made the determination to remove plaintiff from the list.

ANSWER. See answers to Interrogatories 3, 5, and 8, supra.

INTERROGATORY NO. 23. What type of investigation was conducted and pursuant to what authority was it conducted.

ANSWER. See answer to Interrogatory No. 19, supra.

INTERROGATORY NO. 24. Set forth all statutes, rules, regulations, directives, or other authorities pursuant to which plaintiff was removed from the promotion list.

ANSWER. 10 U.S.C. §§ 5902(d) and 5905(a).

INTERROGATORY NO. 25. If the President of the United States did not personally make the decision to remove the plaintiff from the list, who did and pursuant to what authority did he do so?

ANSWER. See answers to Interrogatories 3, 8, and 24, supra.

INTERROGATORY NO. 26. Did the President of the United States provide any input whatsoever into the determination to remove the plaintiff from the list? If so on what dates did he act and set forth all documents and memoranda signed by him or by his direction. If not personally signed by him, set forth any documentary evidence indicating that the documents be signed by direction.

ANSWER. No.

ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 27. Who was President of the United States on the date of the incident? Who was President of the United States on the date of the alleged removal of the plaintiff from the list.

ANSWER. The Honorable Richard M. Nixon and the Honorable Gerald R. Ford respectively.

INTERROGATORY NO. 28. Was the plaintiff in Uniform during the time of the alleged incident or at any time during the meeting whereat the incident occurred, or did he have any identifying insignia, or other feature which would cause observers not personally knowing the said plaintiff to conclude that it was a Naval Officer involved?

ANSWER. No to all questions in this interrogatory.

INTERROGATORY NO. 29. Set forth the date of promotion of the officer on the list immediately senior to plaintiff and that date of promotion of the officer on the list immediately junior to plaintiff.

ANSWER. Next senior: 1 July 1974

Next junior: 1 July 1974

INTERROGATORY NO. 30. Was a determination made that no adverse inference was to be drawn against the plaintiff as a result of the investigation and that there was no punitive action required or inferred against plaintiff? If so set forth the copy of any document respecting the action taken by the Chief of Naval Personnel concluding the investigation. Was the action taken after the removal from the list?

ANSWERS TO INTERROGATORIES

ANSWER. See answers to Interrogatories 20 and 22, supra. The completed JAG Manual investigation was inserted as a "matter of interest" in plaintiff's official record. A copy of the document informing plaintiff of this action is attached as appendix 5. This action occurred after plaintiff was removed from the promotion list.

INTERROGATORY NO. 31. Set forth the qualities and elements required of a commander for inclusion in a list for promotion to Captain.

ANSWER. In addition to traditional qualities and elements expected of all naval officers, specific qualifications were outlined in the precept provided the promotion board that considered plaintiff. See appendix 1.

INTERROGATORY NO. 32. Did plaintiff possess these qualities and elements prior to his selection.

ANSWER. In the promotion board's opinion he did.

INTERROGATORY NO. 33. Did plaintiff possess these qualities and elements on the date he was removed from the list?

ANSWER. No.

INTERROGATORY NO. 34. If not, which qualities or elements was no longer present?

ANSWER. See answer to Interrogatory No. 3, supra.

INTERROGATORY NO. 35. How was the absence of said qualities or elements manifested?

ANSWER. See answer to Interrogatory No. 3, supra.

INTERROGATORY NO. 36 How many years was plaintiff on active Naval duty?

ANSWER. 21 years, 6 months and 20 days.

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ANSWERS TO INTERROGATORIES.

INTERROGATORY NO. 37. Set forth any commendations or medals earned by him during his active duty.

ANSWER. National Defense Service Medal, Republic of Vietnam Campaign Medal w/Device, Armed Forces Expeditionary Medal, Bronze Star Medal, Armed Force Reserve Medal, Air Medal (one Personal Award and 33 Strike/Flight Award), Vietnam Service Medal w/4 Bronze Star, Combat Action Ribbon, Vietnamese Cross of Gallantry w/Gold Star, Presidential Unit Citation, Navy Unit Citation, China Service Medal.

INTERROGATORY NO. 38. Did plaintiff see combat duty, if so in what capacity and during what dates?

ANSWER. Yes. Performed various duties as a combat helicopter pilot including officer in charge of a helicopter detachment and as executive officer of a large helicopter unit operating in Mekong Delta, Vietnam. April 1967 - July 1968.

AFFIDAVIT OF SMITH FOR DEFENDANT

(SAME CAPTION)

AFFIDAVIT

Affiant, first being duly sworn, states and alleges, upon his oath, as follows, to wit:

I am Lieutenant Colonel Donald George Smith, United States Marine Corps, Head Litigation and Civil Process Division, Office of the Judge Advocate General, Washington, D.C.

I am personally familiar with the complaint filed in the above-styled case.

I have reviewed the official record of plaintiff and found his appointments to rank from ensign to commander as follows:

<u>Rank</u>	<u>Date of Appointment</u>	<u>Appointing Official</u>
Ensign	7 September 1953	R. B. Anderson Secretary of the Navy
Lieutenant (junior grade)	7 March 1955	Thomas S. Gates, Jr. Secretary of the Navy
Lieutenant	1 September 1957	John B. Connally Secretary of the Navy
Lieutenant Commander	1 July 1963	Paul R. Ignatius Secretary of the Navy
Commander	1 October 1967	John H. Chafee Secretary of the Navy

Copies of the appointments are attached as appendices A through E.

(Endorsement omitted)

THE
President of the United States of America.

To all who shall see these presents, greeting:

I know ye, that reposing special trust and confidence in the Patriotism, Valor, Fidelity and Abilities of WILLIAM DAVIS MARTIN, do appoint him
ENSIGN

in the Naval Reserve of The United States Navy to rank from the
SEVENTH day of SEPTEMBER, 1865. He is therefore
carefully and diligently to discharge the duties of such office by doing and performing
all manner of things thereunto belonging.

And I do strictly charge and require all Officers, Sailors and Marines under
his Command to be obedient to his orders. And he is to observe and follow such
orders and directions from time to time as he shall receive from me, or the future
President of The United States of America or his Superior Officer set over him,
according to the Rules and Discipline of the Navy.

This commission to continue in force during the pleasure of the President of the
United States for the time being.

Signed at the City of Washington this EIGHTH day of NOVEMBER
in the year of our Lord one thousand nine hundred and SEVENTY-EIGHT
and of the Independence of the United States of America the One Hundred and
SEVENTY-EIGHT.

By the President:

635952

R. A. ANDERSON
Secretary of the Navy

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EXCERPTS OF EX-1BTS OF AFFIDAVIT OF SMITH

Done at the City of Washington this TWENTIETH day of APRIL
in the year of our Lord one thousand nine hundred and FIFTY-EIGHT
and of the Independence of the United States of America the One Hundred and
EIGHTY-FIRST

A BASIC RECORD RECD By the President:

755140

THOMAS S. GATES, JR.

Chief of Naval Air Basic Training
U.S. Naval Air Basic Training Command
Naval Air Station
Pensacola, Florida

United States for the time being

Done at the City of Washington this TWENTIETH day of MAY
in the year of our Lord one thousand nine hundred and SIXTY-EIGHT
and of the Independence of the United States of America the One Hundred and
EIGHTY-FIRST

By the President:

JOHN B. CONNALLY

Secretary of the Navy

Armed Forces of the United States of America

and the component thereof in which this appointment is made

Done at the City of Washington this REINER day of JULY in the year of
our Lord one thousand nine hundred and SIXTY-EIGHT and of the Independence of the United
States of America the one hundred and NINETY SECOND.

By the President:

CHARLES K. DUNCAN
Vice Admiral U.S. Navy
Chief of Naval Personnel

PAUL R. IGNATIUS
Secretary of the Navy

WILLIAM DAVIS MARTIN

Plaintiff,

- against -

JOHN W. WARNER, Secretary of
the Navy and Admiral D. W.
COOPER, Chief of the Naval
Reserves, Department of the
Navy,

STATEMENT PURSUANT TO
RULE 9(g) OF THE GENERAL
RULES OF THIS COURT

Civil Action
No. 74 C 814

Defendants.

X

The material facts relevant to this motion as
to which the defendants contend there is no genuine
issue to be tried are as follows:

1. The plaintiff was selected to be promoted
to the rank of captain by a selection board on February
2, 1974.
2. On February 15, 1974, the Acting Secretary
of the Navy, J. William Middendorf, personally approved,
with the designation "APPROVED FOR THE PRESIDENT", the
recommendation of the said selection board that the plain-
tiff be promoted to captain.
3. The Senate of the United States consented
to the temporary appointment to captain of the plaintiff
on April 21, 1974.

Defendant Rule 9 Statement.

- 2 -

4. On November 12, 1974, the plaintiff was removed from the promotion list by the Secretary of the Navy who purported to be acting for the President pursuant to 10 U.S.C. §5905.

Dated: Brooklyn, New York
May 6, 1976

DAVID G. TRAGER
United States Attorney
Eastern District of New York

By: *Lewis F. Tessler*
Lewis F. Tessler
Assistant U.S. Attorney

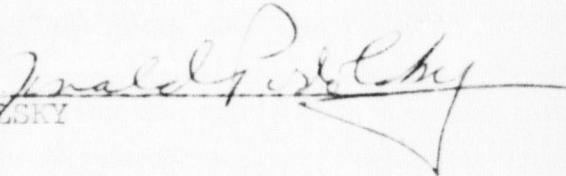
TO:
Ronald Podolsky, Esq.
15 Park Row
New York City, New York 10038
Attorney for Plaintiff

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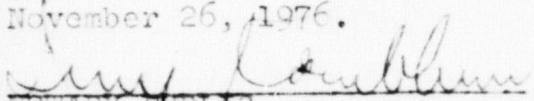
AFFIDAVIT OF SERVICE.

STATE OF NEW YORK: COUNTY OF NEW YORK: ss

RONALD PODOLSKY being duly sworn deposes and says: that he resides at 400 E. 20 St. New York, N.Y.; that on November 26, 1976 he mailed three copies of the within Appendix on Appeal to David W. Traeger, Esq. attorney for defendant-appellees by placing them securely wrapped and with proper postage in a depository of the U.S. Post Office at 15 Park Row, New York, N.Y. and addressed to said attorney at 225 Cadman Plaza East, Brooklyn, N.Y. 11201.


RONALD PODOLSKY

Sworn to before me
November 26, 1976.



NOTARY PUBLIC
IRVING KORNBLUM
NOTARY PUBLIC, STATE OF NEW YORK
No. 00000000
Qualified in New York County
Commission Expires March 30, 1978